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8 Attorneys for Defendants  
9 Woodbine Alaska Fish Company,  
and Guy Ferrari Inc.

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA**

14 CITICAPITAL COMMERCIAL CORP,  
15 Plaintiff,  
16 v.  
17  
18 EGEGIK SPIRIT, official number 2999957,  
her equipment, gear, furniture, apparel,  
fixtures, tackle, boats, machinery, anchors  
and all appurtenances, in rem;  
19  
20 NAKNEK SPIRIT, official number 585824,  
her equipment, gear, furniture, apparel,  
fixtures, tackle, boats, machinery, anchors  
and all appurtenances, in rem;  
21 WOODBINE ALASKA FISH CO.,  
in personam; and GUY FERRARI, INC,  
in personam.  
22  
23  
24 Defendants,

**Case No. A-04-0147 CI  
IN ADMIRALTY**

**ANSWER OF WOODBINE  
ALASKA FISH CO., AND GUY  
FERRARI INC., TO SECOND  
AMENDED COMPLAINT IN  
REM AND IN PERSONAM BY  
CITICAPITAL COMMERCIAL  
CORP.**

26 Defendants WOODBINE ALASKA FISH COMPANY AND GUY FERRARI INC.,  
27 (collectively, the "Defendants"), by and through their undersigned counsel, submit their

1        answer to the second amended complaint of Plaintiff CITICAPITAL COMMERCIAL  
 2        CORP. (“Plaintiff”). Defendants hereby incorporate herein by reference their claims of the  
 3        vessels the NAKNEK SPIRIT and EGEGIK SPIRIT made in August 2004 pursuant to  
 4        Supplemental Admiralty Rule C(6) and, pursuant to Federal Rules of Civil Procedure §§ 8,  
 5        10, and 12, respond to the complaint, admit, deny, and generally deny each and every  
 6        allegation in the second amended complaint, and further deny that Plaintiff has suffered any  
 7        damage in the sum or sums alleged, or in any sum at all, or is otherwise entitled to the relief  
 8        sought or any relief whatsoever as follows:

10              1.        Defendants admit the allegations contained in paragraph 1 of the complaint.  
 11              2.        Defendants lack sufficient information to admit or deny the allegations  
 12        contained in paragraph 2 of the complaint and therefore deny same.

14              3.        Defendants admit the EGEGIK SPIRIT is owned by Woodbine Alaska Fish  
 15        Company, an Alaskan Corporation, and deny the remainder of the allegations contained in  
 16        paragraph 3 of the complaint.

17              4.        Defendants admit the NAKNEK SPIRIT is owned by Guy Ferrari Inc, a  
 18        California Corporation, and deny the remainder of the allegations contained in paragraph 4  
 19        of the complaint.

21              5.        Defendants admit Woodbine Alaska Fish Company is an Alaskan  
 22        Corporation and Guy Ferrari Inc. is a California Corporation and deny the remainder of the  
 23        allegations contained in paragraph 5 of the complaint.

24              6.        Defendants admit, without prejudice, and based upon their present  
 25        information and belief, the execution and delivery of the Promissory Note, but deny the  
 26        remainder of the allegations contained in paragraph 6 of the complaint.

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7. Defendants admit certain preferred ship mortgages were entered into with respect to NAKNEK SPIRIT and the EGEGIK SPIRIT, however, Defendants either lack sufficient information to admit or deny the remainder of the allegations or such allegations call for a legal conclusion and therefore do not call for an admission of facts. As such, Defendants deny the remainder of the allegations contained in paragraph 7 of the complaint.

8. Defendants deny the allegations contained in paragraph 8 of the complaint.

9. Defendants assert that the Note provides for certain costs in collection however, affirmatively assert that Plaintiff's collection efforts were unreasonable, and deny that Plaintiff is entitled to any collection costs.

10. Defendants admit that they signed several documents in connection with the underlying loan. Defendants admit based on information and belief that a check for \$7,500 that was paid to Plaintiff in connection with the loan was returned due to insufficient funds. Defendants lack sufficient information to admit or deny, and as such deny, the remainder of the allegations contained in paragraph 10 of the complaint.

11. Defendants admit that they paid at least \$678.09. Defendants lack sufficient information to admit or deny, and as such deny, the remainder of the allegations contained in paragraph 11 of the complaint.

## AFFIRMATIVE DEFENSES

### FIRST AFFIRMATIVE DEFENSE (Failure to State Sufficient Facts)

The Second Amended Complaint, and each purported claim therein, fails to state facts sufficient to constitute any cause of action against Defendants.

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2                   **SECOND AFFIRMATIVE DEFENSE**  
3                   (Failure to State a Claim)

4                   The Second Amended Complaint, and each purported claim therein, fails to state  
5                   any claim upon which relief can be granted.

6                   **THIRD AFFIRMATIVE DEFENSE**  
7                   (Statute of Limitations)

8                   The Second Amended Complaint, and each purported cause of action alleged therein  
9                   against Defendants, is barred by all applicable statute of limitations provisions.

10                  **FOURTH AFFIRMATIVE DEFENSE**  
11                  (Failure to Mitigate)

12                  To the extent that Plaintiff has failed to mitigate, minimize, or avoid any damages  
13                  allegedly sustained, any recovery against Defendants, if any, must be reduced accordingly.

14                  **FIFTH AFFIRMATIVE DEFENSE**  
15                  (Due Care)

16                  Defendants have at all times exercised due care concerning actions, conduct, or  
17                  other matters alleged in the complaint, or any purported claim asserted therein.

19                  **SIXTH AFFIRMATIVE DEFENSE**  
20                  (Comparative Fault)

21                  Defendants allege that if they were found to have any liability to Plaintiff, which  
22                  they expressly deny, that this Court must reduce the liability of Defendants in proportion to  
23                  the comparative fault of Plaintiff and others.

24                  **SEVENTH AFFIRMATIVE DEFENSE**  
25                  (Contributory Negligence)

26                  Persons and entities, other than Defendants or their agent(s), were negligent and at  
27                  fault in connection with the acts alleged to have resulted in damages, and by reason thereof,

1 Plaintiff's right of recovery against Defendants should be reduced by the amount which the  
 2 negligence and/or fault of persons and entities other than Defendants or their agent(s),  
 3 caused or contributed to any alleged damage.

4

**EIGHTH AFFIRMATIVE DEFENSE**  
 5 (Failure to Fully Set Out Claims)

6 Defendants allege that Plaintiff has failed to set out its claims with sufficient  
 7 particularity to enable Defendants to raise all appropriate defenses and, thus, Defendants  
 8 reserve their right to add additional defenses as the factual basis for these claims becomes  
 9 known.

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**NINTH AFFIRMATIVE DEFENSE**  
 11 (Unclean Hands, Inequitable Conduct)

12 Plaintiff's conduct is barred, in whole or in part, by its own unclean hands and  
 13 inequitable conduct.

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**TENTH AFFIRMATIVE DEFENSE**  
 15 (Waiver, Laches, Estoppel)

16 Plaintiff's conduct is barred, in whole or in part, by the doctrines of waiver, laches,  
 17 and estoppel.

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**ELEVENTH AFFIRMATIVE DEFENSE**  
 19 (Unreasonable Expenses)

20 Plaintiff is not entitled to the advancement it seeks because the nature and size of  
 21 litigation expenses sought by it are unreasonable.

22

**TWELFTH AFFIRMATIVE DEFENSE**  
 23 (Agreement is Not Fully Integrated)

24 These answering Defendants are informed and believe and thereon allege that if  
 25 there presently exists or ever existed, any or all of the alleged rights, claims or obligations

Plaintiff seeks are unenforceable because the written agreement alleged in the complaint is not fully integrated.

## THIRTEENTH AFFIRMATIVE DEFENSE (Mutual Mistake)

These answering Defendants are informed and believe and thereon allege that if there presently exists or ever existed, any or all of the alleged rights, claims or obligations which Plaintiff seeks are unenforceable by reason of mutual mistake.

FOURTEENTH AFFIRMATIVE DEFENSE  
(Equitable Estoppel)

These answering Defendants allege that Plaintiff herein, and each and every Cause of Action contained in the complaint, are barred by reason of acts, omissions, representations and courses of conduct by Plaintiff by which Defendants were led to rely to their detriment, thereby barring, under the doctrine of equitable estoppel, any causes of action asserted by the Plaintiff.

**FIFTEENTH AFFIRMATIVE DEFENSE**  
(Equitable Estoppel)

Plaintiff is estopped to deny that the contract was modified by the oral agreements alleged herein because Defendants were repeatedly misled into believing that the vessels, the EGEGIK SPIRIT and the NAKNEK SPIRIT would be released by Plaintiff, and instead, Plaintiff continued the arrests and eventually sold the vessels at auction for less than the amounts of the loan. Defendants relied on the terms of the modified contract to their detriment.

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 2                   SIXTEENTH AFFIRMATIVE DEFENSE  
 3                   (Modification of Contract)

4                   These answering Defendants allege that on or about July 24, 2004, Plaintiff and  
 5 Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the  
 6 NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract  
 7 alleged in the complaint. The oral agreement was supported by valuable and new  
 8 consideration in that Defendants agreed to obtain insurance on the vessels and agreed to pay  
 9 Plaintiff from the proceeds of fish sales. Defendants have performed all of the conditions of  
 10 the contract, as modified, on their parts to be performed in accordance with the terms of the  
 11 contract as modified.

13                   SEVENTEENTH AFFIRMATIVE DEFENSE  
 14                   (Modification of Contract)

15                   These answering Defendants allege that on or about July 25, 2004, Plaintiff and  
 16 Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the  
 17 NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract  
 18 alleged in the complaint. The oral agreement was supported by valuable and new  
 19 consideration in that Defendants agreed that they would pay Plaintiff \$43,940.82.  
 20 Defendants have performed all of the conditions of the contract, as modified, on their parts  
 21 to be performed in accordance with the terms of the contract as modified.

23                   EIGHTEENTH AFFIRMATIVE DEFENSE  
 24                   (Modification of Contract)

25                   These answering Defendants allege that on or about July 26, 2004, Plaintiff and  
 26 Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the  
 27 NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract

alleged in the complaint. The oral agreement was supported by valuable and new consideration in that Defendants agreed that they would pay \$79,487.65 and agreed to obtain insurance coverage for the vessels. Defendants have performed all of the conditions of the contract, as modified, on their parts to be performed in accordance with the terms of the contract as modified.

**NINETEENTH AFFIRMATIVE DEFENSE**  
(Modification of Contract)

These answering Defendants allege that on or about August 1, 2004, Plaintiff and Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract alleged in the complaint. The oral agreement was supported by valuable and new consideration in that Defendants agreed that they would pay \$125,000 and agreed to obtain insurance coverage for the vessels. Defendants have performed all of the conditions of the contract, as modified, on their parts to be performed in accordance with the terms of the contract as modified.

**TWENTIETH AFFIRMATIVE DEFENSE**  
(Modification of Contract)

These answering Defendants allege that on or about August 6, 2004, Plaintiff and Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract alleged in the complaint. The oral agreement was supported by valuable and new consideration in that Defendants agreed that they would pay \$125,000 and agreed to obtain excess insurance coverage for the vessels. Defendants have performed all of the conditions

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of the contract, as modified, on their parts to be performed in accordance with the terms of the contract as modified.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**  
(Modification of Contract)

These answering Defendants allege that on or about August 10, 2004, Plaintiff and Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract alleged in the complaint. The oral agreement was supported by valuable and new consideration in that Defendants agreed that they would pay \$125,000, agreed to obtain excess insurance coverage for the vessels, and agreed to submit a proposed business plan. Defendants have performed all of the conditions of the contract, as modified, on their parts to be performed in accordance with the terms of the contract as modified.

TWENTY-SECOND AFFIRMATIVE DEFENSE  
(Lack of Subject Matter Jurisdiction)

These answering Defendants allege that this Court does not have subject matter jurisdiction over this case.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**  
(Lack of Subject Matter Jurisdiction)

These answering Defendants allege that any valid contract, preferred ship mortgage, promissory note and modifications thereto as well as the issues in this case are subject to the laws of the State of Texas.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**  
(Modification of Promissory Note)

These answering Defendants allege that the Promissory Note was modified by the parties' subsequent agreement, and that Plaintiff was therefore not entitled to accelerate the Note.

1  
 2                   TWENTY-FIFTH AFFIRMATIVE DEFENSE  
 3                   (Workout Agreement)

4                 These answering Defendants allege that the parties reached a workout agreement  
 5 whereby Plaintiff would release the vessels EGEGIK SPIRIT and NAKNEK SPIRIT and  
 6 Defendants would continue making payments.

7  
 8                   TWENTY-SIXTH AFFIRMATIVE DEFENSE  
 9                   (In the Alternative)

10               In the alternative, should the Court determine that, at the time of contracting,  
 11 Plaintiff and Defendants did not share a common intent with respect to the effect of  
 12 Plaintiff's exercise of the Promissory Note and the two Preferred Ship Mortgages against  
 13 the aforementioned vessels and Security Agreements alleged therein, then there was no  
 14 mutual assent ("meeting of the minds") on the issue, and Defendants have no obligation to  
 15 Plaintiff as to any disputed portion thereof.

16               WHEREFORE, Defendants pray for judgment as follows:

17               1.       That Plaintiff takes nothing by reason of the complaint;

18               2.       That if Defendants are found liable, the degree of the responsibility and  
 19 liability for the resulting damage be determined and that Defendant be liable only for that  
 20 portion of the total damage in proportion to their responsibility for the same;

21               3.       That Plaintiff's improper prayer for attorney's fees be stricken and summarily  
 22 denied;

23               4.       That the vessels be released forthwith;

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1           5. That Defendants be awarded costs of suit herein, attorneys fees, and such  
2 other further relief as the Court deems just and proper.  
3

4           Dated: 31 May 2006

BIRNBERG & ASSOCIATES

5           By: s/Cory Birnberg  
6           Cory A. Birnberg  
7           BIRNBERG & ASSOCIATES  
8           CORY A. BIRNBERG  
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14          California State Bar No. 105468  
15          Attorneys for Cross-Complainants

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**VERIFICATION**

I, Cory A. Birnberg, personally prepared the foregoing Verified Answer and state that the contents thereof are true to the best of my knowledge based upon information and documentation supplied to me by Defendant WOODBINE ALASKA FISH COMPANY, INC and GUY FERRARI INC. I have been authorized to sign this Verification on behalf of Defendants who are currently outside this jurisdiction and are unable to execute the Verification for themselves.

Dated: 31 May 2006

BIRNBERG & ASSOCIATES

By: s/Cory Birnberg  
 Cory A. Birnberg  
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